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In the

Supreme Court of the United States

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October Term, 1965

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No. 652 38

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TRANSPORTATION-COMMUNICATION EMPLOYEES UNION,

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

—o—

BRIEF FOR THE RESPONDENT IN OPPOSITION

—o—

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In the

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October Term, 1965

No. 652

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION,[1]

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION

For the reasons herein detailed, Respondent, Union Pacific Railroad Company, opposes the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in that Court's case No. 7968.

OPINIONS BELOW

The opinion of the district court is reported at 231 F. Supp. 33. The first opinion of the court of appeals

[1] Formerly "The Order of Railroad Telegraphers."

dated July 22, 1965, is reported at 349 F. 2d 408. (Pet. pp. 1a-7a)[2] That court's second opinion dated October 8, 1965 (Pet. pp. 8a-15a), is not yet officially reported. It is unofficially reported at 60 L. R. R. M. 2244.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition. (Pet. p. 4)

QUESTIONS PRESENTED

(1) Whether the National Railroad Adjustment Board in deciding an interunion work-assignment jurisdictional dispute must consider and determine the entire dispute or controversy including the contracts, usage, practices and customs of both claiming unions where the union representing employes performing the disputed work was determined by the Board to be involved and given n o t i c e of the proceeding but, in pursuance of an agreement of all railroad unions d e c l i n e d to participate therein but has stated that if as a result of the Adjustment Board proceedings any work is taken away from employes it represents, redress will be sought by it in separate proceedings against the railroad.

(2) Whether, in an action brought in a U. S. District Court to enforce an award of the National Railroad Adjustment Board sustaining the claim of the union representing telegraph employes to certain work

[2] "Pet." refers to the Supplemental Petition for a writ of certiorari filed herein. "R" refers to the "Transcript of Record" filed in the court of appeals below. "RLEA Br." refers to the brief of the Railway Labor Executives' Association as amicus curiae.

which is being performed by clerical employes the union representing clerical employes performing the disputed work is an indispensable party to such action where, in addition to monetary penalties, a coercive decree is sought which would take the disputed work from clerical employes, and where there may be questions as to the validity or enforceability of such award which might be raised and decided in such action.

STATUTES INVOLVED

The pertinent sections of the Railway Labor Act[3] and the Labor Management Relations Act[4] are set forth in Appendix A, *infra*.

STATEMENT

This case is a statutory action brought under Section 3, First (p) of the Railway Labor Act[5] to enforce Award 9988 of the Third Division of the National Railroad Adjustment Board. (R. pp. 1-4)[6] There is involved a

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[3] 44 Stat. 577 (1926), 48 Stat. 1185 (1934), 45 U. S. C. §§ 151-164 (1964).

[4] 61 Stat. 136 (1947), 29 U. S. C. §§ 151-168 (1964).

[5] 45 U. S. C. § 153, First (p).

[6] A printed pamphlet copy of Third Division Award 9988 is included in the record filed herein by Petitioner. It is also contained in the official reports of the National Railroad Adjustment Board. 96 N. R. A. B. (3d Div.) 286. Page references to Award 9988 are to the pages of the printed pamphlet copy. The printed "award" consists of (1) "Statement of Claim," p. 1, (2) "Employe's Statement Of Facts," p. 1, (3) "Position of Employes," p. 3, (4) "Carrier's Statement of Facts," p. 24, (5) "Position of Carrier," p. 30, (6) "Opinion of Board," p. 43, (7) "Findings," p. 47, (8) "Award," p. 47, (9) "Dissent to Award 9988," p. 47, and (10) "Answer to Dissent," p. 61.

so-called jurisdictional dispute as to which class of employes should be assigned to perform certain work functions between two competing railroad unions, one representing clerical employes and the other telegraphers, the former having performed the work involved for over 12 years. This is a "work-assignment" type of jurisdictional dispute—the conflict being between two groups of employes each represented by a different union and each claiming the exclusive right to the assignment of the work. It is distinguished from the "representational" type of jurisdictional dispute involving a controversy as to which union should represent the employes doing particular work. See *Carey v. Westinghouse Electric Corporation* (1964), 375 U. S. 261, 263.

In 1952, Respondent, Union Pacific, installed IBM office machines in its various yard offices which radically changed the maintenance of railroad car records—work traditionally performed by clerical employes. In the operation of these machines, a communication function previously performed manually by telegraph employes, represented by Petitioner, Transportation-Communication Employees Union (TCU), is now performed when the machines handle certain clerical functions previously performed manually by clerical employes, represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes (BRC).[7]

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[7] Grand President Leighty of TCU has described the operation of these machines as follows:

"* * * The International Business Machine Company brought to the railroad industry the IBM machine in the last few years, which

(Footnote 7 continued on next page)

The basic function of the IBM machines was the performance of clerical work and clerical employes were assigned the work of punching IBM cards and operating the machines. TCU filed a grievance, known in the railroad industry as a "claim," asserting that such work, including the card punching, belonged exclusively to telegraph employes, that its assignment to and performance by clerical employes was in violation of the collective agreement between TCU and Union Pacific, and that such work should be assigned to telegraph employes. TCU also sought continuing penalty payments consisting of eight hour's pay for each eight-hour shift, both day and night, since August 25, 1952. (Award 9988, pp. 1-3)

TCU filed two such claims, one involving the work assignment at Las Vegas, Nevada, and the other at Salt Lake City, Utah. These were handled in the usual manner and ultimately filed as separate disputes by TCU with the Third Division of the Adjustment Board under Section 3, First (i) of the Act.[8] The records in the two

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(Footnote 7 continued from previous page)

can combine the work of the clerical employe, for example, who before prepared the communication and gave it to the telegrapher to transmit, and the work of the telegrapher, because it actually transmits the communication which formerly was transmitted by the telegrapher. Thus, as the clerk does the work on the IBM which he formerly did on the typewriter, preparing a communication for transmission, this machine at the same time cuts the tape the simpler machine (the teletype) used to cut in the telegraph office, and with the assistance of reperforators or a wire chief in combining circuits, this clerk can also in most cases from his clerical station do the actual transmitting in one operation." (Report of G. E. Leighty to Thirty-fifth Regular and Second Quadrennial Session of the Grand Division of The Order of Railroad Telegraphers, Chicago, Ill. June, 1960, quoted in Third Division Award 9988 at page 56.)

[8] 45 U. S. C. § 153, First (i).

dockets were identical as to the work-assignment dispute.[9] The factual statements and argument of TCU and Union Pacific concerning the work-assignment dispute were detailed in the docket covering the dispute at Salt Lake City (resulting in Award 8258, 79 N. R. A. B. (3d Div.) 829, and Award 8656, 83 N. R. A. B. (3d Div.) 337)[10] and incorporated by reference in the Las Vegas docket what was said by each in the Salt Lake City docket. (Award 9988, p. 29)

In both disputes, Union Pacific contended that since the objective of the grievances was the taking of work from clerical employes they were "involved" and that the Board would be without jurisdiction unless they or their collective representative, BRC, were notified and permitted to participate as required under Section 3, First (j) of the Act.[11] TCU denied that the clerks had any interest in the dispute insisting that all that was involved was the interpretation of TCU's agreement with Union Pacific.

The Salt Lake City and Las Vegas disputes, although filed with the Board at the same time, became separated and the Salt Lake City dispute was reached first. The Board refused to notify BRC of the dispute

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9 The Las Vegas dispute (resulting in Award 9988) involved an additional factor, i. e., the delivery of train orders to train crews by clerical employes. That portion of the claim was denied and is not here involved. (Award 9988, p. 43)

10 Unless otherwise indicated, all Adjustment Board awards cited herein are of the Third Division.

11 45 U. S. C. § 153, First (j).

because of the opposition of the labor members.[12] The Board deadlocked on the merits and a referee was appointed under Section 3, First (l)[13] and in Award 8258,

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[12] At that time, it was the policy of the various railroad labor organizations and followed by the labor members on the Adjustment Board in work-assignment jurisdictional disputes to refuse to give notice under Section 3, First (j) and to prohibit participation in Board proceedings by anyone except the involved railroad and the petitioning union. **Whitehouse v. Illinois Central R. Co.** (1955), 349 U. S. 366, 372, **Allain v. Tummon** (CA-7, 1954), 212 F. 2d 32, 35.

This policy is detailed in Appendix B, **infra**, p. 8a, containing excerpts from the Findings of Fact entered in **Missouri-Kansas-Texas R. Co. v. National Railroad Adjustment Board, et al.** (DC-Ill., 1954), 128 F. Supp. 331. That long and protracted litigation, a part of the long-standing jurisdictional dispute between BRC and TCU, involved a series of Adjustment Board awards rendered in proceedings brought separately by TCU and BRC, resulting in the same work being assigned to both telegraphers and clerks. Indeed, BRC and TCU had filed separate enforcement actions in U. S. District Courts in Missouri and Texas seeking to compel M-K-T to comply with some of the awards. (128 F. Supp. at 362) At the Adjustment Board neither union was notified of nor permitted to participate in the disputes filed by the other. In an effort to have the matter resolved, M-K-T filed an action in the U. S. District Court at Chicago, Illinois, seeking to set aside the awards, enjoin their enforcement and to have the Board consolidate all cases, serving notice on both TCU and BRC and allowing both to participate in the consolidated hearing. A preliminary injunction was granted. **Missouri-Kansas-Texas R. Co. v. National Railroad Adjustment Board, et al.** (DC-Ill., 1950), 26 L. R. R. M. 2237, affirmed **sub nom.** in **Missouri-Kansas-Texas R. Co. v. Brotherhood of Ry. & S. S. Clerks** (CA-7, 1951), 188 F. 2d 302. After trial, a permanent injunction was entered. 128 F. Supp. 331. The challenged Board awards were held void. TCU and BRC were enjoined from enforcing the awards by court action or otherwise and a mandatory injunction issued ordering the Adjustment Board to reopen and consolidate all of the cases allowing full participation, after notice, by both TCU and BRC. The court directed that the Board should in deciding these consolidated cases consider the agreements of both BRC and TCU as well as the custom and practice thereunder. The work-assignment disputes were to be finally decided in one proceeding with both TCU and BRC participating. 128 F. Supp. 331 at 372-375. An appeal was taken by TCU and BRC and all individual defendants which they later dismissed. The Adjustment Board, pursuant to the district court's decree and injunction, reopened the dockets, consolidated them, and issued the required notice to the involved employes, TCU, BRC and the railroad carriers advising of the hearing and further handling in a consolidated docket. However, before the scheduled hearing was held, BRC and TCU each withdrew these disputes from the Board, thereby aborting any further Board action. See Judge Minor's order in **Missouri-Kansas-Texas R. Co. v. National Railroad Adjustment Board, et al.**, No. 50 C. 684, dated June 24, 1958.

[13] 45 U. S. C. § 153, First (l).

he held that BRC was "involved" and refused to proceed to consideration of the merits until notice had been given by the Board "to the parties, Carrier, Order of Railroad Telegraphers, and Brotherhood of Railway Clerks." 79 N. R. A.B. (3d Div.) 829, 864.

Notice was given to BRC and the Adjustment Board, with the same referee, again considered the dispute, rendering its Award 8656 on January 12, 1959, in which it held that the disputed work was properly assigned to the clerical employes and that TCU's agreement was not violated. 83 N. R. A. B. (3d Div.) 337.

More than two years later, the same work-assignment dispute, but which arose at Las Vegas, was considered by the Adjustment Board. In the meantime, the various railroad labor organizations affiliated together as the Railway Labor Executives' Association (RLEA) had changed their policy as to the giving of notice in these work-assignment disputes. In June, 1959, RLEA agreed that in these work-assignment disputes "third party" notices to the other union would be issued by the Board. The labor organizations also agreed upon a letter to be used as a reply by any union so notified and that such union would "not otherwise appear or participate in the proceeding."[14]

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[14] This policy understanding is set forth in Interrogatory No. 1 and Answer thereto in Interrogatories to the Plaintiff dated December 9, 1964, and Answers dated December 18, 1964, filed in The Order of Railroad Telegraphers v. Southern Pacific Company, No. Civ. 4812-Phx., pending in the U. S. District Court for the District of Arizona. A certified copy of these documents has been lodged with the Clerk of this Court. At the oral argument before the court of appeals below, these documents were accepted by and were before that court after counsel for TCU had stated he had no objection. The policy declaration referred to and attached to the Answers to the Interrogatories is reproduced in Appendix C, infra, p. 11a.

Thus, in the Las Vegas dispute, the Board, pursuant to Section 3, First (j) of the Railway Labor Act,[15] notified BRC of the hearing advising that it could "appear and file papers and documents." (R. p. 7) At that time and for some time previous, clerical employes represented by BRC were performing the work claimed by TCU. Nevertheless, President George M. Harrison of BRC wrote the Adjustment Board the RLEA-prescribed letter (Appendix C, *infra,* p. 14a), in which he stated that it was his "understanding" that the dispute was simply one between TCU and Union Pacific involving an interpretation of TCU's agreement with Union Pacific and that neither BRC nor the clerical employes it represented were involved in the dispute. The President of BRC asked the Board to advise him if his "understanding of the nature of the dispute" were incorrect. (The Board did not answer this letter.) The letter also stated the rights of Union Pacific clerical employes were "predicated" upon BRC's agreement with Union Pacific. The BRC President recognizing that resolution of the dispute might adversely affect clerical employes made it clear that if as a result of the Board proceedings any work belonging to BRC was taken away from the clerical employes, BRC would proceed separately against Union Pacific before the Board "to correct any such violation of our agreement." (R. p. 8) The BRC made no appearance and filed no further papers in the dispute.

Award 8656, covering the work-assignment dispute at Salt Lake City, held the work was properly assigned

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[15] 45 U. S. C. § 153, First (j).

to clerical employes and that TCU's agreement was not violated. This determination was "final and binding" under Section 3, First (m).[16] However, the Adjustment Board in Award 9988 (with a different referee) sustained TCU's claim as to a violation of TCU's agreement, finding that the work was improperly assigned to clerical employes and that such work should be assigned to telegraph employes. The Board also directed that Union Pacific should pay the "senior idle employe covered by the Telegraphers' Agreement" a day's pay for each 8-hour shift when the machines were used. (Award 9988, p. 47) The Adjustment Board did not consider the BRC Agreement, or the custom, practices or claims thereunder. (Award 9988, pp. 44-46)[17]

Union Pacific did not comply with the award and TCU filed this enforcement action, under Section 3, First (p),[18] in the District Court for the District of Colorado. In its prayer for relief, TCU asked that the court enforce the award "by writ of mandamus or otherwise" and, in addition, that Union Pacific be ordered to "make an accounting of all monies due" under the award. (R. p. 4)

Union Pacific's motion to dismiss was sustained by the district court on its determination that BRC was

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[16] 45 U. S. C. § 153, First (m).

[17] The court below found that the Board considered TCU's contract as if BRC's contract did not exist. (Pet. p. 13a).

[18] 45 U. S. C. § 153, First (p).

an indispensable party to the enforcement action.[19] (R. p. 16) The district court found that the Adjustment Board had made BRC a party to the proceedings before it (R. p. 14)[20] and held BRC to be "indispensable to a determination of the same issues in a trial *de novo* before the Court." (R. p. 14) TCU failed to make BRC a party defendant although given that opportunity and final judgment of dismissal with prejudice was entered (R. pp. 17-18) from which it appealed to the United States Court of Appeals for the Tenth Circuit.

The court of appeals, in an opinion dated July 22, 1965, found that the Board had failed to construe TCU's contract with regard to, and with reference to BRC's position and contract and vacated the award. The court remanded the case to the Board to hold "a complete hearing" which should "include all issues, practice, and usage, including the effect of the Clerks' contentions and contract, which are necessary to a complete disposition of the dispute as to all concerned parties." (Pet. p. 7a)

On October 8, 1965, the court below withdrew its prior opinion and judgment,[21] substituting therefor a different opinion and judgment (Pet. pp. 8a-16a) in

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[19] In the district court, TCU suggested Union Pacific should have utilized the third party procedures provided under Rules 14(a) and 19(b) of the Federal Rules of Civil Procedure. But it was shown that the dispute involved work being performed by clerical employes at Las Vegas, Nevada, and the unit of BRC which represented clerical employes at Las Vegas was limited geographically to the territory from Ogden, Utah to Los Angeles, California. TCU did not raise the point in the court of appeals below.

[20] TCU did not challenge this holding in the court below.

[21] Union Pacific had filed a petition for rehearing before the court of appeals limited to the question of the jurisdiction of the court to remand the case to the Adjustment Board under Section 3, First (p) and a motion for permission to file it out of time. The court did not act on these further pleadings.

which it affirmed the district court's judgment of dismissal for lack of an indispensable party and also because the Board had failed to properly exercise its primary jurisdiction. (Pet. p. 14a) The court pointed out that if BRC had been joined in the enforcement action "the matters relating to their [BRC] position and contract could have been presented to the court thereby filling the same void we find to exist.[22] (Pet. p. 15a)

The court of appeals recognized this case as "but another episode in the long-standing jurisdictional struggle" between BRC and TCU. (Pet. p. 9a) It found that the authority and jurisdiction of the Adjustment Board under Section 3, First (i)[23] over this type of a work-assignment dispute was clearly established in the *Pitney*[24] and *Slocum*[25] cases. It also said that "it has now become established that under the circumstances existing in this case, notice is required to be given to the Clerks' Union." (Pet. p. 11a) The notice requirement, the court said, is derived from the "scope and

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[22] Before the court of appeals, Union Pacific's argument was essentially premised upon the indispensable party issue. In its brief, however, Union Pacific pointed out that under this Court's decisions in Slocum v. Delaware, L. & W. R. Co. (1950), 339 U. S. 239, and Order of Railway Conductors v. Pitney (1946), 326 U. S. 561, the Adjustment Board in the proper exercise of its jurisdiction should have considered TCU's contract in the light of others between the Union Pacific and BRC whose members were performing the claimed work, and contended that in the anticipated trial de novo, the district court should exercise that same jurisdiction and consider those same matters. The Board's failure to consider the BRC contract and its conflicting work claims was not directly challenged because of the assumption that the opportunity for a trial de novo in the district court would make any such position premature, in that this error might still be corrected or resolved in such trial. See Whitehouse v. Illinois Central R. Co. (1955), 349 U. S. 366.

[23] 45 U. S. C. § 153, First (i).

[24] Order of Railway Conductors v. Pitney (1946), 326 U. S. 561.

[25] Slocum v. Delaware, L. & W. R. Co. (1950), 339 U. S. 239.

nature of the issues before the Board" (Pet. p. 12a), rejecting the idea that scope and nature of the issues in a work-assignment dispute are to be derived only from the manner in which TCU might have framed its claim, pointing out that since there is "but one job or classification which is sought for the members of two different and competing unions," the "concern" of the other union was a "very real one." (Pet. p. 12a)

According to the court below "the fundamental issues before the Board included those pertaining to the Clerks and to their contract" and "the Clerks for all practical purposes thereby become parties to the administrative proceedings." With the real issues of the inter-union dispute thus defined and the Board's jurisdiction established, it follows that "the Board must exercise" its authority "over the whole dispute at one time, not half at one time with one set of participants, and half at another" time. (Pet. p. 14a) Since the Adjustment Board decided telegraph employes' rights with reference only to TCU's agreement, the court held the Board had failed to decide the actual dispute presented for decision and thus had failed to meet the responsibilities of its primary jurisdiction.

ARGUMENT

The decision of the Court of Appeals for the Tenth Circuit is correct and is not in conflict with the decision of any other circuit or of this Court. There is no occasion for further review.

1. Under This Court's Decisions, the Adjustment Board was Required to Decide the Entire Work-Assignment Dispute - Not Just a Part of it.

Twenty years ago this Court in *Order of Railway Conductors v. Pitney* (1946), 326 U. S. 561, held that interunion disputes involving work assignments in the railroad industry were to be resolved by the National Railroad Adjustment Board. This Court said that agency was especially created to "interpret contracts such as these in order *finally to settle* a labor dispute,"[26] and that it was "peculiarly competent to handle the basic question here involved," *id.* at 565, 566.

There was involved a work-assignment dispute between two unions (ORC and BRT) each claiming that its respective agreements with the railroad reserved the same work to the employes whom they represented. ORC filed suit in a U. S. District Court, sitting as a bankruptcy reorganization court, asking it to instruct its railroad trustees to assign the disputed work to conductors represented by it instead of those represented by BRT. An injunction was sought, BRT intervened and the matter was referred to a master who found that the work should be assigned to BRT conductors. The court of appeals dismissed on the basis that the dispute was exclusively within the jurisdiction of the Adjustment Board, 145 F. 2d 351. On certiorari, this Court affirmed stating that the remedies of the Railway Labor Act for the settlement of this kind of dispute were exclusive. It was pointed out that a determination of the dispute required an "in-

[26] Emphasis is supplied unless otherwise indicated.

terpretation of *these contracts"* and under Section 3, First (i) of the Railway Labor Act,[27] "the court should not have interpreted the contracts for purposes of finally adjudicating the dispute between the unions and the railroad." Dismissal of the action was stayed, however, "so as to give an opportunity for application to the Adjustment Board for an interpretation of the agreements." *Id.* at 568.

Justice Black, speaking for this Court, pointed out what was required of the Adjustment Board in deciding these work-assignment disputes:

> "* * * We have seen that in order to reach a final decision on that question the court first had to interpret the terms of O. R. C.'s collective bargaining agreements. The record shows, however, that interpretation of these contracts involves more than the mere construction of a 'document' in terms of the ordinary meaning of words and their position. [Citations omitted.] *For O. R. C.'s agreements with the railroad must be read in the light of others between the railroad and B. R. T. And since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom, that too must be taken into account and properly understood.* The factual question is intricate and technical. An agency especially competent and specifically designated to deal with it has been created by Congress. * * *" (*Id.* at 566)

On this problem, the Court's decision in *Pitney* was unanimous; Justice Rutledge dissented, but on another point. He agreed that the district court should retain jurisdiction "pending interpretation of the agreements," *id.* at 567, 568, but felt that ORC was entitled to

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[27] 45 U. S. C. § 153, First (i).

an injunction until the Board had acted. That he was otherwise in agreement with the majority is shown in his dissent:

> "* * * This in turn will depend upon the effect which the Board finds should be given to the prior agreements, including not only the 1940 contract with O. R. C., but the basic agreements of 1927 and 1928 with O. R. C. and B. R. T., respectively, as affected by the establishment of switching limits in 1929 and other matters bearing upon the interpretation of the written contracts and the rights of the parties." (*Id.* at 569, n. 2)

A few years later in *Slocum v. Delaware, L. & W. R. Co.* (1950), 339 U. S. 239, this Court was again faced with an interunion work-assignment dispute similar to that in *Pitney* and here. TCU and BRC were each claiming under their separate agreements with the railroad certain jobs for its members. The railroad had assigned the work to clerks. TCU protested, urging reassignment to telegraph employes and claiming back pay. The railroad brought a declaratory judgment in a New York court. On certiorari, this Court, after noting that these work-assignment cases "involving the railroad and *two* employee accredited bargaining agents" furnish a "potent cause of friction," (*Id.* at 243, 244) reaffirmed and re-emphasized the decision in *Pitney*:

> "We hold that the jurisdiction of the Board to adjust grievances and disputes *of the type here involved* is exclusive." (*Id.* at 244)

See also, *Brennan v. Delaware, L. & W. R. Co.* (N. Y., 1952), 303 N. Y. 411, 103 N. E. 2d 532, cert. den. (1952) 343 U. S. 977.

TCU's challenge of the decision of the court of appeals below is based upon a narrow construction of Section 3, First of the Act[28] and an even more restrictive reading of *Pitney* and *Slocum*. There is no basis for TCU's suggestion that this Court in *Pitney* and *Slocum* was unaware that in each of those cases there were two competing unions seeking the performance of the same work. The issue in those cases, according to TCU, was simply whether a court could "entertain a suit alleging a breach of collective bargaining agreements between a railroad and *a* union involving an assignment of work." (Pet. p. 14) Indeed, TCU argues that the only lesson offered by these two cases is that the Adjustment Board need only "consider all evidence including other agreements." (Pet. p. 15) Finally, TCU argues that under these cases this Court held the agreement of the other union should be considered *"merely as an aid* in interpreting the agreement forming the basis of the claim." (Pet. p. 16) But this is not, we submit, what this Court held in *Pitney* and *Slocum,* nor is it what Congress intended in Section 3 of the Act.

Adjustment Board handling of interunion work-assignment disputes would thus be reduced to an exercise in futility. The court below correctly decided that the Act did not intend that these jurisdictional disputes be decided in a "piecemeal manner." (Pet. p. 13a) The Act was intended "to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements.

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[28] 45 U. S. C. § 153, First.

* * * "[29] But under the erroneous concept advanced by TCU nothing would be resolved—indeed, every time the Adjustment Board decided a work-assignment dispute in favor of the claiming union another dispute would be created. And this is exactly what happened on the Missouri-Kansas-Texas Railroad as detailed in footnote 12, *supra,* at page 7. *Missouri-Kansas-Texas R. Co. v. N.R.A.B., et al.* (DC-Ill., 1954), 128 F. Supp. 331. See, also, *Order of Railroad Telegraphers v. New Orleans, Texas & M. R. Co.* (CA-8, 1956), 229 F. 2d 59, cert. den. 350 U. S. 997.

In *Labor Board v. Radio & Television Broadcast Engineers Union* (1961), 364 U. S. 573, this Court clearly recognized that to decide a work-assignment dispute such as this meant a decision of the whole dispute, including which union should perform the work:

> "* * * Any decision short of that would obviously not be conducive to quieting a quarrel between two groups which, here as in most instances, is of so little interest to the employer that he seems perfectly willing to assign work to either if the other will just let him alone. * * *" (*Id.* at 579)

This Court correctly refused to accept any narrow reading of Section 10(k) of the Labor Management Relations Act.[30] That section provided the NLRB should "hear and determine the dispute" referring to the same type of dispute as here—a work-assignment dispute determinable by interpretation of existing agreements. Justice Black, speaking for a unanimous court, rejected

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[29] 45 U. S. C. § 151a(5).

[30] 29 U. S. C. § 160(k).

NLRB's arguments that this language limited it "to strictly legal considerations growing out of prior Board orders, certifications or collective bargaining agreements," *id.* at 578, saying:

> "We conclude therefore that the Board's interpretation of its duty under § 10(k) is wrong and that under that section it is the Board's responsibility and duty to decide which of two or more employee groups claiming the right to perform certain work tasks is right and then specifically to award such tasks in accordance with its decision. * * *" (*Id.* at 586)

Only recently, in *Carey v. Westinghouse Electric Corporation* (1964), 375 U. S. 261, 275, (dissent) Mr. Justice Black pointed out that in both the Labor Management Relations Act and the Railway Labor Act, Congress hoped to "abate" jurisdictional disputes "between unions over which union members would do certain work," citing *Radio & Television Broadcast Engineers Union* and *Pitney* (*Id.* at 275, n. 2)[31]

Congress' use of the words "make an award" in Section 3, First (1) of the Railway Labor Act,[32] indicates a clear intention that the disputes or controversies in their entirety were to be resolved. There is no basis for suggesting that Congress intended the Adjustment Board should only half-decide these disputes on a piecemeal basis. To do so would be contrary to the basic and un-

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[31] Mr. Justice Black also noted that in these situations the employer "has done nothing wrong" and to subject him to damages was contrary "to the basic principles of common everyday justice." 375 U. S. 261, 275.

[32] 45 U. S. C. § 153, First (1).

derlying general purposes of the Act and the general duties imposed.

TCU suggests such an approach should be rejected here, arguing that the Adjustment Board's jurisdiction is limited to "a determination of whether the collective bargaining agreement has been violated." (Pet. p. 14, footnote.) This has been TCU's argument advanced over the years, indeed by all of the railroad unions—an approach, we submit, which only serves to frustrate any possible, meaningful settlement of these disputes. It finds no sanction in the Railway Labor Act, which in language similar to Section 10(k) tells the Adjustment Board it is "to make an award with respect to any dispute submitted to it."[33] And the Board's jurisdiction extends over all disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions."[34] In short, TCU and RLEA argue, despite the similarity of language and purpose, that the Adjustment Board should be limited as the NLRB before *Radio & Television Broadcast Engineers Union* held that Section 10(k) meant what it said.

Both TCU and RLEA assume that the scope and issues of a work-assignment dispute before the Adjustment Board can be limited simply by the careful framing of their grievances ("Statement of Claim," Award 9988, p. 1) so as to make it appear that all that is involved is an interpretation of a collective agreement.

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[33] 45 U. S. C. § 153, First (n).

[34] 45 U. S. C. § 153, First (i).

The court below properly rejected this "horse blinders" concept and recognized that the issues of a dispute must be derived from a consideration of all of the facts.[35]

Both TCU and RLEA also erroneously assume that these work-assignment disputes present only the question of whether a railroad has bound itself by "overlapping contracts" to both TCU and BRC. (Pet. p. 20, RLEA Br. p. 5) It is argued that both unions could have a contractual right to the same work and thus each union's claim of work right should be decided only in the context of that union's contract. The court of appeals below rejected such an argument and correctly recognized that this was not a case of "overlapping" or inconsistent contracts, that only one of the two competing unions could have the lawful right to claim a given work assignment, and that the Board's function was to resolve the entire dispute. While inconsistent contracts might have been possible at common law, this is not the situation under the national labor policy as expressed in the labor acts. See *Textile Workers v. Lincoln Mills* (1957), 353 U. S. 448, 456-457, and *Labor Board v. Radio & Television Broadcast Engineers Union* (1961), 364 U. S. 573.

Railroads no longer have the right to treat with or contract with respect to a given subject matter with whomever they might otherwise choose. Under Section 2, Ninth,[36] once a collective bargaining representative

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[35] The Court of Appeals for the Third Circuit said such a contention had an "attractive simplicity" but nevertheless rejected it as being "an unacceptable means of avoiding a jurisdictional dispute." National Labor Relations Board v. Local 1291, International Longshoremen's Association (CA-3, 1965), 345 F. 2d 4, 8, 10, cert. den. October 25, 1965.

[36] 45 U. S. C. § 152, Ninth.

is selected to represent employes performing a given classification of work, the railroad is obligated to treat only with that representative for all purposes of collective bargaining.

As RLEA recognizes (RLEA Br. p. 9), this section "imposes the affirmative duty to treat only with the true representative, and *hence the negative duty to treat with no other.*" *Virginian Ry. Co. v. System Federation No. 40* (1937), 300 U. S. 515, 548; *Texas & New Orleans R. Co. v. Brotherhood of Ry. & S. S. Clerks, et al.* (1930), 281 U. S. 548.

The extent to which any union can bargain for the right to perform work is limited by the scope of its capacity as representative.[37] An employer can properly negotiate and enter into an agreement covering the right to perform certain work only with the true representative of the group whose craft line encompasses that particular work. Where one craft representative has successfully secured recognition and contractual rights to a given class of work, no agreement with a different representative or group of employes covering that same work would be valid. This restriction on the common law concept of freedom of contract, which is so vital to the national labor policy, does not impinge upon constitutional guarantees. *Virginian Ry. Co. v. System Federation No. 40* (1937), 300 U. S. 515, 558-559.

In *General Committee, B. L. E. v. M-K-T R. Co.*

[37] A union has no right to demand and insist that an employer expand the bargaining unit to include additional work, N. L. R. B. v. Local 19, International Bro. of Longshoremen (CA-7, 1961), 286 F. 2d 661, cert. den. 368 U. S. 820; U. S. Pipe and Foundry v. N. L. R. B. (CA-5, 1962), 298 F. 2d 873, cert. den. 370 U. S. 919. Under both labor acts, conflicting individual contracts with employes who are represented collectively are not enforceable. J. I. Case Co. v. Labor Board (1944), 321 U. S. 332, Order of Railroad Telegraphers v. Railway Express Agency, Inc. (1944), 321 U. S. 342.

(1943), 320 U. S. 323, the BLE, representing railroad engineers, brought a declaratory judgment action to declare void an agreement between the railroad and the BLF&E concerning the use of firemen as engineers in emergency service. BLE argued that it had the exclusive right to bargain with M-K-T with respect to work falling within that craft, engineers' work, and that the agreement with BLF&E was void. BLE's argument was summarized as follows:

> "* * * Thus it is argued that the reasons which support the holding in the *Virginian Ry. Co.* case that the right of majority craft representation is exclusive also suggests that Congress intended to write into the Railway Labor Act a restriction on the rules and working condition concerning which the craft has the right to contract. It is pointed out that if the jurisdiction of a craft within which the exclusive right may be exercised is not limited, then disputes between unions may defeat the express purposes of the Act. In that connection reference is made to the statement of this Court in the *Virginian Ry. Co.* case (300 U. S. p. 548) that the Act imposes upon the carrier 'the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other.' That expresses the basic philosophy of § 2, Ninth. * * *" (*Id.* at 335)

This Court ultimately held that the resolution as to which union had the right to contract for this work was not justiciable by a court,[38] but did not impair its prior recognition that under the Railway Labor Act only one

[38] **Amicus RLEA's statement (RLEA Br. p. 6) that the decision below is in conflict with the General Committee, B. L. E. case is incorrect. In that case BLE sought a declaratory judgment that an agreement with BLF&E was in violation of the Railway Labor Act. This Court simply held such a dispute to be non-justiciable in the courts. The Adjustment Board was not mentioned. Moreover, the General Committee, B. L. E. case is cited in Pitney, 326 U. S. 561, 566, n. 3.**

of those two competing unions had the right to contract for any particular work.

Under the Railway Labor Act, therefore, a railroad cannot enter into duplicating or "overlapping contracts" with respect to the same work. It can only properly and validly contract with the representative which is entitled to represent employes performing that particular type of work and no other. The suggestion that an employer might be equally bound under its contracts with both the competing unions has been and must be rejected as contrary to the national labor policy. *Labor Board v. Radio & Television Broadcast Engineers Union* (1960), 364 U. S. 573; *International Bro. of Carpenters v. C. J. Montag & Sons* (CA-9, 1964), 335 F. 2d 216, cert. den. 379 U. S. 99. *Amicus* RLEA has itself recognized that the "strict principles of commercial contract law and the common law of master and servant" are not appropriate guidelines in this area. Brief for RLEA as *Amicus Curiae,* p. 12, *Gunther v. San Diego & Arizona Eastern Ry. Co.,* decided December 8, 1965, 34 U. S. Law Week 4058. To the extent that it might be argued that the same work had been reserved in contracts of two different unions, one of those reservations would be valid and the other invalid. It is not a situation of "overlapping contracts."

RLEA argues that under the decision below a union's agreement would be "rewritten or modified" by the Adjustment Board (RLEA Br. p. 4). But the national labor policy as discussed above precludes a railroad from validly contracting the same work to two crafts. Plainly, the determination by the Adjustment Board as to which

craft has the right to the work is not to rewrite or modify a collective agreement any more than any interpretation of vague and ambiguous contractual provisions can be said to be rewriting or modifying a contract.

Both TCU and RLEA argue that the decision below conflicts with certain "indications" this Court made in *Whitehouse v. Illinois Central R. Co.* (1955), 349 U. S. 366.[39] This Court is supposed to have "indicated" that in a case like this BRC allegedly would in no way be affected by giving it notice of the Board proceedings. (Pet p. 17; RLEA Br. p. 6) *Whitehouse* involved an action by a railroad to enjoin the Board from proceeding on a claim of TCU on the grounds that BRC had not been given notice in that proceeding. The Supreme Court, while it raised many controversial questions, left them unanswered, resting its decision on the sole ground that the injunction action was premature. In that case, this Court was not concerned with an enforcement action and its dicta relied on by TCU and RLEA was clearly predicated upon the possibility that the Board might issue an award denying the claims adverse to the BRC and the railroad and would thus entail them no harm.

This same contention was made and rejected in *Order of Railroad Telegraphers v. New Orleans, T. & M. Ry. Co.* (CA-8, 1956), 229 F. 2d 59, cert. den. 350 U. S. 997, where *Whitehouse* was found to be limited to a holding of prematurity and of no controlling effect in an enforcement action after an award had been rendered:

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[39] Pet. pp. 16-17; RLEA Br. p. 6.

> "* * * the Supreme Court chose to stay within 'the wise limitations on our function' and confined itself 'to deciding only what is necessary to the disposition of the immediate case.' It observed that 'Railroad's resort to the courts has preceded any award, and one may be rendered which could occasion no possible injury to it.' By divided Court it simply reversed the decree of injunction on the ground that prior to any proceedings brought by Telegraphers before the Board, 'the injuries are too speculative to warrant resort to extraordinary remedies.' The Court declined to adjudicate upon the merits of the controversy." (*Id.* at 66)

The limited and narrow scope of *Whitehouse* was recently reiterated in this Court's decision in *Carey v. Westinghouse Electric Corporation* (1964), 375 U. S. 261, 266.

In the *Carey* case, *supra,* IUE was certified to be the representative of all "production and maintenance" employes at one of respondent's plants. Another union (Federation) was certified to represent "salaried, technical" employes. IUE, proceeding under its contractual grievance procedure terminating with arbitration, claimed that production and maintenance work was being performed by employes represented by Federation. The question presented was whether the Court should force Westinghouse to proceed to arbitration with IUE with Federation absent from such proceeding. This Court held that the arbitration should proceed. IUE and Westinghouse had agreed upon arbitration and the possibility that such handling might end the dispute plus the national labor policy of encouraging arbitral handling were at the heart of this Court's decision. How-

ever, the decision was not reached without difficulty.[40]

TCU relies on *Carey,* saying that the instant case is the same except that arbitration has taken place here, and TCU argues that because this Court ordered arbitration to proceed in *Carey,* the Adjustment Board award here can be "assumed to be valid and subject to enforcement even though the other union was not a party to the arbitration" (Pet. p. 19). We suggest this is a rather big assumption. In *Carey* it was recognized that "unless the other union intervenes, an adjudication of the arbiter might not put an end to the dispute." *Id.* at 265.[41]

While in this case the competitors are clerks and telegraphers, both subject to the jurisdiction of the Third Division of the Adjustment Board, *Amicus* RLEA argues that situations might arise where the competing employes were subject to the jurisdiction of two different divisions of the Board. (RLEA Br. p. 8) This presents no real problem and would seldom occur. The

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[40] See the concurring opinion of Justice Harlan and the dissent of Justices Black and Clark, p. 273, as well as the majority opinion, pp. 265, 272.

[41] Petitioner's reliance (Pet. p. 19) on **International Brotherhood of Firemen and Oilers v. International Association of Machinists** (CA-5, 1964), 338 F. 2d 176, affirming 234 F. Supp. 858, is less helpful. That case involved a work-assignment dispute between the Machinists and the Firemen and Oilers. The court simply enforced an arbitration award in favor of the Machinists made under the AFL-CIO "no-raiding agreement" in which both unions had participated and the employer had agreed that it would accept the court's decision. 338 F. 2d 176, 178. The court enforced the "no-raid" award notwithstanding the fact that it was contrary to a prior arbitration award in favor of the Firemen and Oilers in which the Machinists were not a party. (The "no-raiding" award which was enforced will be found in 35 Lab. Arb. 9. The prior award involving only Firemen and Oilers and the employer, Carling Brewing Company, is unreported but is described in 35 Lab. Arb. 9, 10 and 234 F. Supp. 858, 860.)

jurisdiction of the various divisions is based upon "a craft or job classification irrespective of the labor organization representing the particular employes involved." *Order of Railway Conductors v. Swan* (1947), 329 U. S. 520, 528. In any event, RLEA has itself decided that the Board should give "third party" notices "whether or not the rights of such third parties are subject to the jurisdiction of another division of the Board." (Appendix C, *infra*, p. 13a.) See *Seaboard Air Line R. R. v. Castle* (DC Ill., 1958), 170 F. Supp. 327, 330.

Contrary to the hypothetical predictions made by *Amicus* (RLEA Br. p. 9), the decision below presents no threat to the "effectiveness" of the Adjustment Board nor does it "pervert" the latter's functions. The court below recognized, as did the Court of Appeals for the Ninth Circuit in *International Brotherhood of Carpenters v. C. J. Montag & Sons* (CA-9, 1964), 335 F. 2d 216, that:

> "* * * A jurisdictional dispute is not 'determined' by attempting to muffle it by a decision which embodies the evils of duplication and featherbedding at the expense of the employer, which Congress sought to eliminate." (*Id.* at 222)

Instead, under the holding of the court below the Adjustment Board will meet the responsibilities of its primary jurisdiction and resolve these jurisdictional work-assignment disputes in accordance with congressional intent and this Court's decisions.

2. The Enforcement Action was Properly Dismissed Because of the Absence of an Indispensable Party.

The alternative holding of the court of appeals below affirming the dismissal because of the absence of an indispensable party was sound and correct. It is in accord with *Order of Railroad Telegraphers v. New Orleans T. & M. Ry.* (CA-8, 1956), 229 F. 2d 59, cert. den. 350 U. S. 997, and furnishes an additional basis for denying certiorari.

The district court found that BRC was indispensable to the action since the enforcement of Award 9988 would give to telegraph employes work now being performed by clerical employes.[42] It cited and quoted from *Missouri-Kansas-Texas R. Co. v. Brotherhood of Ry. & S. S. Clerks* (CA-7, 1951), 188 F. 2d 302 (R. pp. 12-13):

> "* * * We can think of no employee having a more vital interest in a dispute than one whose job is sought by another employee or group of employes." (*Id.* at 306)

It may be contended that the decisions below were premised on the assumption that in an enforcement action there would be a trial *de novo* of the merits of the dispute (R. p. 14; Pet. p. 15a) Since the decision below was rendered, this Court in *Gunther v. San Diego & Arizona Eastern Ry.* (U. S. December 8, 1965),

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[42] On appeal, contrary to its position in the district court, TCU denied it was seeking anything other than money damages. However, this is of no moment to the indispensability question. Allain v. Tummon (CA-7, 1954), 212 F. 2d 32, 36.

34 U. S. Law Week 4058, has held that a district court could not "review an Adjustment Board's determination on the merits of a grievance" in an action to enforce an award ordering the reinstatement of an employe. TCU may contend that in *Gunther* this Court has rejected *de novo* review of all awards of the Adjustment Board. The scope and extent of this Court's decision in *Gunther* and whether it would be applicable to an enforcement action involving an award in a work-assignment dispute may not now be entirely clear. Nevertheless, this case does not present such questions because apart from any *de novo* review questions, there remain valid and compelling reasons which require that BRC have been made a party to this enforcement action.

There is, of course, in any enforcment action the "crucial question" as to whether the award sought to be enforced was validly made. See *Elgin, J. & E. Ry. Co. v. Burley* (1945), 325 U. S. 711, 720. In this consideration, a serious problem is posed because of the directly contrary prior award of the Adjustment Board. In Award 8656, it was held that the performance of the work by clerical employes did not violate TCU's agreement. Under Section 3, First (m) of the Act,[43] the decision in Award 8656, favoring the BRC, was "final and binding" on TCU. BRC thus has a real interest in any enforcement of the subsequent contrary Award 9988 which would be substantially affected and is thus indispensable to the enforcement action. *Shield v. Barrow* (1854), 21 U. S. 409, 17 How. 130, 139. *Order of Rail-*

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[43] 45 U. S. C. § 153, First (m).

road Telegraphers v. New Orleans, T. & M. Ry. (CA-8, 1956), 229 F. 2nd 59, 67, cert. den. 350 U.S. 997. *Green v. Brophy* (CA-DC, 1940), 110 F. 2d 539.

There are other matters which the District Court must inquire into in an enforcement action even though it does not review the merits of the dispute, e. g., the Board's jurisdiction, the adequacy of the notice served on BRC (R. p. 7), and the effect of BRC's letter to the Board (R. p. 8).[44]

In *Brotherhood of Railroad Trainmen v. Swan* (CA-7, 1954), 214 F. 2d 56, it was held that an employe or group of employes whose work was being claimed by another group in a proceeding before the Board —

> "* * * will be entitled to be present at all hearings in these matters, introduce evidence, cross-examine all witnesses heretofore or hereafter produced by parties with opposing interests, and make arguments. They have a substantial right to be heard on all matters which materially affect their interests. * * *" (*Id.* at 59)

The right of parties performing the work to participate in proceedings in which a competing union claims the same right to the same work has been held to reach constitutional due process requirements. *Hunter v. Atchison, T. & S. F. Ry. Co.* (CA-7, 1948), 171 F.

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[44] In the courts below, TCU argued that the BRC letter was a specific disclaimer of "any interest in the dispute" and that by declining to participate in the Adjustment Board proceedings on this claim, BRC has in effect indicated its disinterest and waived any future rights to the work. The determination of this issue itself is a matter in which BRC would clearly have an "interest" which could be directly affected by the enforcement proceeding.

2d 594; *Allain v. Tummon* (CA-7, 1954), 212 F. 2d 32, 37; *Griffin v. Chicago Union Station* (DC-ND, Ill., 1936), 13 F. Supp. 722, 724. Similarly, the railroad has a reciprocal right that such participation be extended to all parties who would be affected by the decision in order to assure that any such decision would be *res judicata* and binding upon all such parties. *Allain v. Tummon, supra,* at p. 36; *Kirby v. Pennsylvania R. Co.* (CA-3, 1951), 188 F. 2d 793, 799; and such right is also protected by constitutional guarantees, *M-K-T R. Co. v. N. R. A. B.* (DC-ND Ill., 1954), 128 F. Supp. 331, 369.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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January, 1966.

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APPENDIX A

Relevant Statutory Provisions

Railway Labor Act (Pub. No. 257, 69th Cong., appd. May 20, 1926, 44 Stat. 577, as amended by Pub. No. 442, 73rd Cong., appd. June 21, 1934, 48 Stat. 1185), 45 U. S. C., ch. 8; U. S. C. A., Title 45 secs. 151-164.

Section 151a:

"GENERAL PURPOSES

"The purposes of the chapter are:

"(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

Section 152:

"GENERAL DUTIES

* * * * *

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or

carriers and by the employees thereof interested in the dispute.

"Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. * * *

* * * * *

"Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided,* (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees

reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further,* That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

* * * * *

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. * * *

* * * * *"

Section 153, First:

"There is hereby established a Board, to be known as the 'National Railroad Adjustment Board', the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

"(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as

have been or may be organized in accordance with the provisions of section 2 of this Act.

• • • • •

"(c) The national labor organizations as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

• • • • •

"(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

"First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

"Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

"Third division: To have jurisdiction over dis-

putes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

"Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

"(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

* * * * *

"(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as 'referee,' to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

"(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

* * * * *

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in

the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

* * * * *

"(w) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes,

and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (1) hereof, with respect to a division of the Adjustment Board."

Labor Management Relations Act (Pub. No. 101, 80th Cong., appd. June 23, 1947, 49 Stat. 136), 45 U. S. C., ch. 7; U. S. C. A., Tit. 29, secs. 151-168.

Section 10(k):

"Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

APPENDIX B

Excerpts from Findings of Fact entered by the United States District Court, Northern District of Illinois, Eastern Division in *Missouri-Kansas-Texas R. Co. v. National Railroad Adjustment Board, et al.*, Civil Action No. 50 C 684, reported at 128 F. Supp. 331:

"64. ORT regained its place on the Board in 1949, after subscribing to BRC's program for Board

procedure and joining BRC and other labor organizations in the following agreement:

> 'The Chief Executives of the organizations which take cases to the Third Division agreed that any disputes brought to that Division would be supported by the Labor representatives on that Division, provided the provisions of the agreement of the organization submitting the claim did sustain the position taken by the organization. It was further agreed that in the event the application of a sustaining award would result in a violation of the rules of another agreement, the second organization could also bring a claim to the Third Division to correct such violation and in the event the rules of the agreement involved supported the claim all of the Labor Members of the Board would support that claim. In other words the decisions of the Labor Members on the Board would be based upon the rules in the agreement of the Organization bringing the claim and they would vote to sustain the claim if supported by the rules of the agreement involved or to deny the claim if not supported by the rules of the agreement involved which is the intent and purpose of the Railway Labor Act.'

"This was the same procedural program previously advocated by the BRC and which the labor members of the Board followed from July, 1942 to September, 1949, during which period there was no ORT representative on the Board.

* * * * *

"156. In disputes such as those involved in Awards 3932, 3933, 3934, 4735, and 5014, it is the settled custom and practice of the Board:

"(a) Not to give notice of the filing of a claim to anyone except the claimant and the railroad named in the claim.

"(b) Not to permit anyone, except the claimant and the railroad named in the claim, to file papers or other documents with the Board.

"(c) Not to give notice of hearing to anyone except the claimant and the railroad named in the claim.

"(d) Not to permit anyone, except those to whom the Board has given notice, to be present at the hearing or to participate in the hearing.

"(e) Not to permit anyone to intervene.

"(f) Not to recognize anyone as a party to a proceeding except the claimant and the railroad named in the claim, and not to make anyone else a party to a proceeding, even when requested to do so.

"157. The settled custom and practice of the Board, described in Finding 156, is caused by the position of the labor members of the Board that only the claimant and the railroad named by the claimant should be given notice and an opportunity to be heard.

"158. The position of the labor members of the Board, described in Finding 157, is the result of a policy fixed by agreement between the chief executives of the railroad labor organizations who comprise the Railway Labor Executives Association and who select, control and discipline the labor members of the Board.

"159. The carrier members of the Board are opposed to its settled custom and practice described in Finding 156. It is their position that the Board should give notice and an opportunity to be heard to all employees and labor organizations involved in disputes submitted to the Board.

"160. The conflicting positions of the labor members and of the carrier members of the Board

make it impossible for the Board to decide the issue as to notice and hearing without the aid of referees.

"161. Referees appointed to break deadlocks as to notice and hearing are divided in their opinions. Some agree with the position of the labor members of the Board and render awards on the merits without giving notice and opportunity to be heard; others agree with the position of the carrier members of the Board but render awards dismissing the claims, without prejudice, instead of ordering that notice and hearing be given.

"162. These divergent views and actions of the Board members and the referees, described in Findings 158 to 161, have produced an administrative deadlock, stalemate and frustration on the Board. The carrier members have asked for judicial guidance."

Note: The letters "ORT" in the foregoing referred to The Order of Railroad Telegraphers now changed to Transportation-Communication Employees Union. The letters "BRC" referred to the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

APPENDIX C

Policy Declaration of Railway Labor Executives' Association and excerpt from Answer to Interrogatory No. 1, in *The Order of Railroad Telegraphers v. Southern Pacific Company,* No. Civ. 4812-Phx, pending in the U. S. District Court for the District of Arizona.

"Following the decision of the Supreme Court in March 1956, refusing to grant certiorari in the case of *O. R. T. v. N. O. T. & M. Ry. Co.,* 350 U. S. 997, the Organizations whose Chief Executives were affiliated with the Railway Labor Executives' Association decided to review their policy position that neither the

Railway Labor Act nor the Constitution of the United States required the divisions of the National Railroad Adjustment Board to serve third party notices.

"In June 1959, the Chief Executives affiliated with the Railway Labor Executives' Association agreed to a Policy Declaration that they would no longer oppose the issuance of third party notices by the divisions of the National Railroad Adjustment Board, and that each Organization receiving a third party notice would reply to such notice in substantially the same manner set forth in a proposed letter attached to the Policy Declaration. A copy of the Policy Declaration with attachment is attached hereto as Exhibit 1."

Policy Declaration Agreed Upon by Chief Executives Affiliated with Railway Labor Executives' Association

The standard Railway Labor Organizations have consistently taken the position that neither the Railway Labor Act nor the Constitution of the United States require the National Railroad Adjustment Board to serve a so-called "third party notice" except in a few isolated instances. The carrier and the carrier members of the Adjustment Board have just as consistently maintained that such notices must be given in all cases where a decision of the Board may conflict with any alleged claim or interest of an employee or labor organization not initially a party to the Board's proceedings.

The lower courts for the most part, have rejected the contention of the labor organizations even in those cases where the alleged third party interest is subject to the jurisdiction of a different division of the Board and the Railway Labor Executives' Association has been unable to obtain a review of these decisions by the United States Supreme Court.

The members of the Railway Labor Executives' Association have agreed that continued opposition to the issuance of the third party notice would be futile and costly

whether or not it involves employees whose rights are subject to the same or different divisions of the Board. It has also been agreed that by abandoning our opposition to the granting of a third party notice, the affiliated organizations are not receding from their position that the Board is without authority to adjudicate any rights of any such third party which arises under an agreement different from the one the interpretation or application of which is sought in the initial submission to the Board. In other words, we are maintaining our position that the Board is not empowered to reconcile conflicting agreements or render any decision which will conflict with the rights of such third parties or their representatives to have the collective bargaining agreements interpreted and applied in proceedings initiated by them.

For the purpose of implementing this policy, all affiliated organizations have agreed as follows:

(a) That third party notices should be issued by all divisions of the Adjustment Board in each case where the carrier members of the Board requests it and in any other case in which the submissions of the parties disclose the existence of an interest in third parties whether or not the rights of such third parties are subject to the jurisdiction of another division of the Board, and

(b) That each organization receiving a third party notice shall reply to such notice substantially in the manner set forth in a proposed letter which is attached hereto as Exhibit A and shall not otherwise appear or participate in the proceeding.

The foregoing procedure was adopted to expedite the handling of third party notice cases and to avoid litigation which appears to have little hope of success in view of the precedents already established.

———o———

Exhibit A

_____ Executive Secretary
National Railroad Adjustment Board

_____ Division
220 South State Street
Chicago 4, Illinois

Dear Mr. _____:

I acknowledge receipt of your letter of _____ giving notice of the pendency of the following dispute before the _____ Division, National Railroad Adjustment Board:

(Quote description of claim as stated in notice)

You advise that said dispute bearing Docket No. ____ will be heard at _____, on _____, at the headquarters of the _____ Division of the National Railroad Adjustment Board, Room _____, Consumers Building, 220 South State Street, Chicago, Illinois.

From the description of the dispute set forth in your letter, it would appear that this is a dispute between the (Carrier) on the one hand and the (petitioning organization) on the other hand involving the interpretation or application of the agreement between them covering the rates of pay, rules and working conditions of employees represented by (petitioning organization). If this understanding is not correct, I would appreciate being further advised.

If my understanding of the nature of the dispute, as set forth in the preceding paragraph, is correct, please be advised that neither the (organization) nor the employees it represents are involved in such a dispute between a carrier and the representative of another craft concerning the interpretation of its agreements between the carrier

and the representative of such other craft. The rights of employees represented by the (organization) are predicated upon agreements between the carriers and our organization. If, at any time, and for any reason, a carrier party to an agreement with our organization should undertake to assign work covered by such agreement to employees not covered thereby, we shall, of course, take appropriate steps pursuant to the provisions of the Railway Labor Act to correct any such violation of our agreement and to protect the employees we represent against any loss resulting from any such violation.

Very truly yours,